IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.239 OF 2003

...

Curzon Maritime Ltd. ...Petitioner

v/s.

PEC Ltd. ...Respondent

...

Mr.Prashant S. Pratap for the Petitioner.

Mr.Rajivkumar i/b M/s.Consulta Juris for the Respondent.

...

CORAM: D.K.DESHMUKH, J.

DATED: 14TH MARCH,2005

JUDGMENT:

1. This petition is filed under Section 48 of the Arbitration & Conciliation Act, 1996 claiming a declaration that the arbitral awards dated 30th September, 2002 and 5th November, 2002 are enforceable as a decree of this Court.

2. The facts that are material and relevant for deciding this petition are:

. The Petitioner, a company organised under the laws of United Kingdom, was Disponent owners of the vessel SHIKOKU PRIDE, which was chartered by them to Commodities Intertrade (India) Pvt.Ltd. on certain terms and conditions. The terms of this charter agreement provided for arbitration in London and English Law was to apply. The Respondent PEC Ltd. were the owners of a cargo of bagged sugar shipped on board the said vessel SHIKOKU PRIDE at the port of Mumbai. The Commodities Intertrade (India) Pvt.Ltd. was acting as an agent of the Respondent in the shipment of the goods under the Bill of Lading.

According to the Petitioner, the vessel SHIKOKU PRIDE completed the loading of the Respondent's cargo at Mumbai on 21st December 2001 and arrived at Port Sudan on 31st December 2001. Though according to charter agreement, freight was to be paid to the Petitioner within four banking days upon completion of loading and signing of bills of lading. Freight was not paid to the Petitioner even when the vessel arrived at Port of Sudan on 31st December, 2001. As per the terms of the charter agreement, if freight was not paid the vessel was entitled to drop anchor outside the territorial waters of Sudan and all time lost was entitled to be counted as detention at the rate of US$ 6,000.00 per day. In this situation, therefore, according to the Petitioner, the Petitioner instructed the Master of the vessel to wait outside Port of Sudan. At this point of time, negotiations took place between the Petitioner and the Respondent and an agreement was reached between the parties on or about 9/10th January 2002 by which it was agreed by the Respondent that they would pay all freight under the charter party to the Petitioner and shall also pay the loadport demurrage. According to the Petitioner, the agreement that was reached between the Petitioner and the Respondent is set out

in the letter dated 10-1-2002, which was signed by Mr.Lalit Dongre on behalf of the Respondent. In view of this agreement reached between the parties the vessel entered the Port of Sudan and discharged the cargo. The Respondent by letter dated 15-1-2002 confirmed that the goods were shipped by them and requested the Petitioner to deliver the cargo to the receiver without production of the original bill of lading. The Respondent paid only the balance freight and the loadport demurrage to the Petitioner leaving a balance of US$ 115,777.01 towards charges of detention at Port of Sudan as also lawyer's fees totalling US$ 9,682.7. As these amounts were not paid by the Respondent, the Petitioner took steps for recovery of the sum. According to the Petitioner, the Respondent as shippers of the cargo under the Bill of Lading was bound by the terms of the Bill of Lading which provided for incorporation of all charterparty terms including the law and arbitration clause. According to the Petitioner, therefore, a notice for commencement of the arbitration proceeding was given. The Petitioner informed the Respondent that they have appointed Mr.Bruce Harris as their arbitrator. The Respondents were called upon to appoint their nominee within 14 days. It was

informed that failure of the Respondents of appointing their nominee within seven days will result in Mr.Bruce Harris acting as the sole arbitrator. There was no response from the Respondents. Therefore, another letter dated 28th March, 2002 was addressed to the Respondents. By communication dated 1st April, 2002 the Respondents informed that they never agreed to arbitration and that they will not participate in the arbitration proceedings. The Respondents sent another communication dated 8th April, 2002 making allegations against the Petitioner that the Petitioner had in collusion with Preetika Shipping Agency Pvt.Ltd., who were the Charterers' agents at the Port of Loading, Mumbai presented a forged Charterparty and Bill of Lading. The allegations were denied by the Petitioner. Arbitration proceedings, therefore, went ahead. The Plaintiffs filed their claims and submissions. Respondents did not appear before the Arbitrator. The Arbitrator found that there was an arbitration clause which was binding on the Respondents and therefore he had the jurisdiction to make the award. The Arbitrator ultimately made an award directing the Respondents to pay an amount of US$ 150,939.92 with interest at the

rate of 4% per annum compounded at three-monthly rests from 1st February 2002 until the date of realisation. The present petition has been filed for enforcement of this award made by the learned Arbitrator.

3. The learned Counsel appearing for the Petitioner submits that this petition is filed under Section 48 of the Act for enforcement of the Foreign Award. In terms of the provisions of sub-section 1 of Section 48, this Court can refuse to enforce the foreign award at the request of the Respondent, only if the Respondent furnishes to the court proof on the points which are mentioned in clauses (a) to (e) of sub-section 1 of Section 48 or sub-section 2 of Section 48. According to the learned Counsel, thus, in view of the provisions of Section 48 burden to prove that the award is not enforceable is on the Respondent. In the present case, the only ground on which the Respondent claims that the enforcement of the award should be refused is that the award is without jurisdiction, in as much as, there was no existing arbitration clause binding between the parties. Submissions of the learned Counsel is two fold. Firstly, he submits that in fact the

arbitration clause in agreement between the Petitioner and the Respondent exists. The second submission of the learned Counsel is that enforcement of a foreign award cannot be refused under Section 48 on the ground that the award has been made by the arbitrator, who did not have the jurisdiction.

4. So far as first submission is concerned, the learned Counsel submits that the arbitration clause pursuant to which the award has been made is contained in the charter party. The bill of lading which was issued for loading the cargo on the vessel describes the Respondent as a "shipper" of the cargo. The bill of lading shows that the cargo was shipped by Commodities Intertrade on account of the Respondent. Condition No.1 of the Conditions of Carriage contained in the bill of lading lays down that all the terms, conditions, liberty and exceptions of the charter party dated 11-9-2001 including the law and arbitration clause are incorporated. Thus, the arbitration clause contained in the charter party is incorporated in the bill of lading. According to the learned counsel, the Respondent is a party to the bill of lading, because the bill of lading itself describes him as a

"shipper". The learned Counsel further submits that in the letter dated 15-1-2002 the Respondent in terms says that the cargo was shipped by the Respondent on the vessel. Therefore, according to the learned Counsel the Respondent confirmed the position that he is the shipper of the cargo, and therefore is a party to the bill of lading, and the arbitration clause which is incorporated in the bill of lading is binding on the Respondent and therefore, according to the learned Counsel the contention of the Respondent that there is no arbitration clause in existence between the Petitioner and the Respondent has no substance. The learned counsel relying on the provisions of Section 48 of the Act submits that the Court can not refer to enforce a foreign award on the ground that the arbitrator had no jurisdiction to make the award. The learned Counsel submits that perusal of the provisions of Section 34 of the Act shows that a domestic award also cannot be set aside on the ground that the arbitrator had no jurisdiction to make the award. In so far as the domestic award is concerned, it becomes possible for the court to set aside the award on the ground that it is without jurisdiction because of the provisions of Section 16 of the Act. The provision similar to the provision

of Section 16 is not to be found in Part-II of the Act, which relates to the foreign award and therefore, according to the learned Counsel, the court cannot refuse enforcement of the foreign award on the ground that the arbitrator had no jurisdiction to make the award.

5. On behalf of the Respondent, on the other hand, it is submitted that the claim before the arbitrator was for recovery of freight and other charges. The Respondent became liable because of the agreement contained in the agreement at Exh.A. Agreement at Exh.A does not contain any arbitration clause and therefore, no arbitration proceedings could have been initiated against the Respondent for recovery of the charges which became payable by the Respondent because of the agreement at Exh.A. According to the Respondent even the arbitrator in the award has held that the liability of the Respondent to pay the claim made by the Petitioner is because of the agreement at Exh.A, and therefore, according to the learned Counsel appearing for the Respondent, as the liability to pay the amount that was claimed by the Petitioner from the Respondent does not arise out of the bill of lading or the charter party which

contained the arbitration clause, the arbitrator had no jurisdiction to make the award. In so far as the second submission of the Petitioner is concerned, it is submitted that though there is no specific provision in Section 48 that enforcement of the foreign award can be refused if the court finds it to be without jurisdiction, in the submission of the learned Counsel the enforcement of foreign award which the court finds to be without jurisdiction can be refused in view of provisions of sub-section 2 of Section 48, because according to the learned Counsel enforcement of award which is nullity in the eye of law is contrary to the public policy of India. The learned Counsel relies on the judgment of the Supreme Court in the case of Kiran Singh and ors. v/s. Chaman Paswan and ors, AIR 1954 SC, 340 to submit that a decree passed by the court which did not have the jurisdiction is a nullity and therefore that decree can be challenged at the stage of execution or even in the collateral proceedings. The learned Counsel also relies on a judgment of the Supreme Court in the case of ONGC v/s Saw Pipes Ltd., 2003 (5) SCC, 705 for the purpose of definying the term "public policy".

6. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that the charter party dated 11-9-2001 contains an arbitration clause. That clause reads as under:-

> Cl 19A:To read as follows: This charter Party shall be governed by and construed in accordance with English Law and any dispute arising out of this charter party shall be referred to Arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enectment thereof for the time being in force. Unless both parties agree upon a sole Arbitrator, one Arbitrator shall be appointed by each party and the Arbitrators so appointed shall appoint a third Arbitrator, the decision of the three-man Tribunal thus constituted or any two of them shall be final. On the receipt by one party of the nomination in writing of the other party's Arbitrator, the party shall appoint their Arbitrator within 14 days, failing which the decision of the single Arbitrator appointed shall be final. For

disputes where the total amount claimed by either party does not exceed the amount of USD 25,000 the Arbitration shall be conducted in accordance with the small claim procedure on the London Maritime Arbitrators.

7. The bill of lading dated 20th September, 2001 in relation to the cargo in question is at Exh."C" to the petition. The bill of lading describes "shipper" as under:-

Shipper
COMMODITIES INTERTRADE
2346 SECTOR-C POCKET II
VESANT KUNJ, NEW DELHI-110 070 INDIA
TEL.3711836-38 FAX 91-11-3711840
A/C PEC LIMITED, NEW DELHI

8. It is, thus, clear that the bill of lading says that the cargo has been shipped by Commodities Intertrade on account of the Respondent. The bill of lading also provides that the freight shall be paid as per the charter party dated 11-9-2001.

Condition No.1 of Conditions of Carriage reads as under:-

> All terms and conditions, licences and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause is herewith incorporated.

It thus clear that the arbitration clause quoted above contained in the charter party is incorporated in the bill of lading. The bill of lading is a contract between the shipper and the owner. Perusal of the bill of lading at Exh."C" shows that it has been issued on behalf of the owner of the vessel by the agent in favour of the shipper. Thus, on the face of it the bill of lading shows that it is an agreement between the shipper and owner of the vessel in relation to the carriage of the cargo. The bill of lading at Exh.C also shows that the shipper is Commodities Intertrade who were acting on account of the Respondent. Thus, on the face of it, Exh.C shows that the Respondent is the real shipper on whose behalf the Commodities Intertrade was acting. This position is reaffirmed by the

Respondent in the letter of the Respondent dated 15-1-2002. Paragraph (1) of that letter reads as under:-

> The above goods were shipped on the above ship by M/s.PEC Limited and consigned to SIDCO International Co.Ltd. Khartoum Sudan for delivery at Port Sudan Sea Port but the relevant bills of lading has not arrived and we, M/s. PEC Limited, "Hansalaya", 15-Barakhamba Road, New Delhi- 110 001 India hereby request you to give delivery of the cargo to Danship Shipping co. Port Sudan A/c SIDCO International Co.Ltd., Khartoum, Sudan at Port Sudan Sea Port without production of the Original Bills of Lading.

The above quoted paragraph establishes beyond any pale of doubt that the Respondent unequivocally accepted that the Respondent is the shipper of the cargo. Thus, had there been any doubts about the Respondent’s position as a shipper on the basis of only the bill of lading are cleared by the letter dated 5-1-2002, where the Respondent clearly states

that he is shipper of the cargo. Thus, in my mind there is no doubt that the Respondent was a party to the bill of lading as a shipper and therefore, in the agreement between the Petitioner and the Respondent there was an arbitration clause and therefore the arbitrator had the jurisdiction to make the award. So far as the liability of the Respondent is concerned, there was no debate before me that the Respondent would be liable to pay the balance amount which was claimed by the Petitioner. Really speaking apart from the Respondent incurring liability to make the payment under the bill of lading, in the letter dated 10-1-2002, the Respondent in clear terms stated thus:

> Furthermore, PEC Ltd. irrevocably guarantee payment of, and will pay, any and all discharge port demurrage (if any) which is due and/or which becomes due from Charterers to Owners, which demurrage will be paid at the rate of US$ 6,000/- per day effective from the expiry of lay time calculated as per the Charter Party, PEC Ltd. will pay such demurrage to owners within four Indian banking days completion

of discharge.

9. The submissions of the learned Counsel appearing for the Respondent that liability to pay the amount which was claimed by the Petitioner before the arbitrator was taken up by the Respondent for the first time by letter dated 10-1-2002 at Exh.A, in my opinion, has no substance. Because it is the Respondent who was liable to pay from the beginning the freight and other charges as shipper of the cargo. As I have found that the Respondent was shipper of the cargo under the bill of lading, it is his liability to pay the freight. What is done by letters dated 10-1-2002 and 15-1-2002 is that the position of the Respondent as the shipper and its is liable to pay the freight and other charges is reaffirmed by the Respondent.

10. There was considerable debate before me on the second contention urged on behalf of the Petitioner that the enforcement of foreign award on the ground that it is without jurisdiction cannot be refused by the court. If one goes through the provisions of Section 48, it becomes clear that this ground is not

specifically mentioned in Section 48 of the Act. Provisions of Section 48 and Section 34 are para-materia. Section 34 by itself also does not make a provision for setting aside of the domestic award on the ground that it is without jurisdiction. Because of the provisions of sub-section 6 of Section 16 the court can in an application filed under Section 34 make an order setting aside a domestic award on the ground that it is without jurisdiction. But a provision like the provision of sub-section 6 of Section 16 is not to be found in Part-II of the Act. Therefore, I find that there is a considerable substance in the contentions urged on behalf of the Petitioner that when the legislature has not incorporated the provision like the provision of sub-section 6 of Section 16 in part II it can not be read into the provisions of sub-section 2 of Section 48. But, it has also to be seen that because of the provision of Section 49, a foreign award which the court finds to be enforcable is deemed to be a decree passed by that court and when that decree is put to execution, it may be possible for the judgment debtor to resist the execution on the ground that the decree is without jurisdiction. It is further to be seen that a

domestic award can be set aside under Section 34 by the court on the ground that the arbitrator was biased, not because of the provision of Section 34 itself, but because of the provisions of Section 13(5) of the Act. Section 48 of the Act does not provide that the court can refuse to enforce a foreign award on the ground that it is vitiated because of bias and in Part II there is no provision similar to section 13. Therefore does it mean that the court can not refuse to enforce a foreign award though it finds that the arbitrator was biased. In my opinion, all these aspects will have to be considered in detail before a final opinion can be expressed on the point. However,in my opinion, it is not necessary for me to express any final opinion on this point, as decision on this point is not absolutely necessary for deciding this petition, because I found that in the present case, it cannot be said that the learned Arbitrator had no jurisdiction to make the award. Therefore, I propose not to express any final opinion on this point.

11. In the result, therefore, present petition succeeds and is allowed. Petition is granted in

terms of prayer clause (a). The Respondent is directed to pay costs of this petition to the Petitioner as incurred by the Petitioner.

...